

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOSUE SOTO *et al.*, ) Case No. 08 CV 33 L (WMC)  
Plaintiffs, )  
v. )  
DIAKON LOGISTICS (DELAWARE), INC., ) [ECF No. 191.]  
Defendant. )  
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)

## I. Background

The matter before the Court is Plaintiffs' motion to commence discovery under the California Labor Code Private Attorney General Act of 2004 ("PAGA"). [ECF No. 191.] Plaintiffs have brought the instant action as a class action on behalf of similarly situated drivers throughout California *and* as a representative action under the PAGA. In their motion, Plaintiffs move to begin formal discovery of PAGA-related issues now that class-related discovery has concluded and their motion for class certification is on file with Judge Lorenz. [ECF No. 191 at 2.] Plaintiffs seek to move forward with PAGA-related discovery in order to avoid delay and spoliation of evidence. [ECF No. 194 at 3.]

Defendant opposes Plaintiffs' motion arguing good cause is required to begin PAGA-related discovery under a now outdated Scheduling Order issued in April of 2009, which simply states: "Counsel have met and provided a proposed scheduling plan for the case addressing first the issue of class certification, with the merits to follow." [ECF No. 69 at 1; ECF No. 192 at 2.]

1 Defendant also objects to discovery on the grounds that: (1) Plaintiffs must satisfy the  
 2 requirements imposed by Rule 23 of the Federal Rules of Civil Procedure governing class action  
 3 certification (ECF No. 192 at 3); and (2) Plaintiffs' PAGA claim is invalid for failure to exhaust  
 4 administrative remedies. [ECF No. 192. at 4.]

5 In support of their motion to commence discovery, Plaintiffs reply that their motion is in  
 6 keeping with the guidelines proposed in the April 2009 Scheduling Order. Although the Court  
 7 advises Defendant that the opposition brief of a motion to compel is an inappropriate forum in  
 8 which to challenge the validity of Plaintiffs' PAGA claim, Plaintiff has nevertheless provided  
 9 exhibits with their reply brief, which demonstrate on their face compliance with the notice  
 10 requirements necessary to bring a PAGA claim. Finally in reply, Plaintiffs notes that while the  
 11 Ninth Circuit has yet to decide whether Rule 23 certification applies to PAGA claims, the  
 12 majority view holds PAGA actions do not require Rule 23 certification because unlike class  
 13 actions, actions under the PAGA are designed to protect the public from illegal conduct as an  
 14 extension of California's labor law enforcement agencies and are not for the benefit of the party  
 15 bringing the action. [ECF No. 194 at 4.]

16 **II. Discussion**

17 **A. Plaintiffs Have Demonstrated Diligent Compliance With The Outdated  
 18 Scheduling Order And Have Shown Good Cause, Even Though Not Required, To Move  
 19 Forward With Discovery**

20 The Court will only modify dates set forth in a scheduling order upon a showing of good  
 21 cause by the moving party. Fed. R. Civ. P. 16. Accordingly, under Rule 16 of the Federal Rules  
 22 of Civil Procedure, the court is required to issue a scheduling order as soon as practicable, and  
 23 the order "must limit the time to join other parties, amend the pleadings, complete discovery, and  
 24 file motions." Fed.R.Civ.P. 16(b)(3)(A). Once a scheduling order has been filed pursuant to  
 25 Rule 16, the "schedule may be modified only for good cause and with the judge's consent."  
 26 Fed.R.Civ.P. 16(b)(4). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of  
 27 the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609  
 28 (9th Cir.1992).

1       The Scheduling Order proposing the sequence of discovery in the instant case was issued  
2 in April of 2009, before Judge McCurine was assigned to the matter. The April 2009 Scheduling  
3 Order does not elaborate on the timing of PAGA-related discovery other than to state: “Counsel  
4 have met and provided a proposed scheduling plan for the case addressing first the issue of class  
5 certification, with the merits to follow.” [ECF No. 69 at 1; ECF No. 192 at 2.] Accordingly, the  
6 Court finds Plaintiffs’ request to commence PAGA-related discovery now that the class  
7 certification motion has been filed is reasonable and in keeping with the language of the April  
8 2009 Scheduling Order.

9       In addition, the deadlines listed in the April 2009 Scheduling Order occurred in 2009 and  
10 have long passed. As a result, the Court finds Plaintiffs’ request for discovery is not a motion for  
11 modification of the scheduling order requiring good cause. Furthermore, even if good cause  
12 were required, Plaintiffs have shown good cause for moving forward with PAGA-related  
13 discovery. There is no argument that Plaintiffs have not been diligent in their prosecution of this  
14 case. Nevertheless, this case is three-years-old. In order to use the time efficiently, prevent  
15 further delay and preserve evidence, the second phase of discovery as contemplated by the  
16 parties should begin. This result is particularly fitting considering the fact that Plaintiffs’ PAGA  
17 claim may proceed as a non-class representative action regardless of whether classwide claims  
18 are certified by the District Judge.

19       **B. Overview of Non-class representative PAGA actions**

20       In 2009, the California Supreme Court held that a representative action under PAGA did  
21 not have to satisfy class action requirements in the state courts. *See Arias v. Superior Court*, 46  
22 Cal. 4<sup>th</sup> 969, 975 (2009). The California Supreme Court found that due process did not require  
23 class certification because a plaintiff bringing a PAGA claim acts “as the proxy or agent of the  
24 state’s law labor enforcement agencies.” *Id.* at 986. Following this state supreme court holding,  
25 federal district courts faced with the issue of determining whether a California PAGA claim must  
26 meet the Rule 23 class certification requirements have been split. *See McKenzie v. Fed. Exp.*  
27 *Corp.*, 765 F.Supp.2d 1222, 1233 (C.D. Cal.2011) (listing California district courts holding class  
28 certification requirements of Rule 23 do not apply to PAGA claims). Moreover, the Ninth

1 Circuit has not decided the issue. Of the district courts considering the issue, only a minority  
 2 have held that Rule 23 applies to PAGA claims. The majority of district courts have held that  
 3 PAGA actions, although representative, do not need to be brought as class actions in light of the  
 4 fact that PAGA operates as a law-enforcement mechanism as opposed to an action which  
 5 conveys a private benefit on the named plaintiff and those represented. *See e.g. Thomas v. Aetna*  
 6 *Health of Cal., Inc.*, 2011 WL 2173715, at \*12-13 (E.D. Cal. June 2, 2011) (explaining “while  
 7 the Ninth Circuit has not addressed these issue, the majority view among the district courts  
 8 following *Arias* creates the following framework: (1) PAGA actions must be filed as  
 9 representative actions on behalf of current or former aggrieved employees; (2) while PAGA  
 10 actions may be brought as class actions, Rule 23 certification is not necessary to the extent  
 11 PAGA actions are brought in a non-class representative capacity; and (3) prudential standing  
 12 concerns as to non-class representative PAGA suits are either satisfied ... or inapplicable....”).

13 Plaintiffs move to proceed with discovery on their PAGA claim. [First Amended  
 14 Complaint, ECF No. 28 at 19-25.] Specifically, Plaintiffs propose limited interrogatories and  
 15 depositions and requests for production concerning driver settlement statements and supporting  
 16 documents. [ECF No. 191 at 4.] Given that the majority of district courts which have held Rule  
 17 23 certification is *not* necessary for PAGA actions brought in a non-class representative capacity,  
 18 the Court finds it is in the interest of efficient case management in this three-year-old case to  
 19 allow the parties to begin PAGA-related discovery now that class-based discovery is complete  
 20 and the motion for class certification is pending. Moreover, Plaintiffs have indicated that  
 21 regardless of the outcome of the motion for class certification, the instant action will proceed as  
 22 non-class representative action under PAGA.<sup>1</sup> [ECF No. 191 at 4.] Accordingly, there is no  
 23 justification for delaying further discovery pending the outcome of the class certification motion.

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 28 <sup>1</sup>Defendant also argues Plaintiffs’ PAGA claim is invalid for failure to exhaust administrative remedies.  
 The Court does not rule on the validity of the First Amended Complaint’s PAGA claim in a motion to compel  
 discovery.

1     **III. Conclusion**

2         Plaintiff's Motion for Leave to Commence PAGA Discovery is **GRANTED**. The Court will  
3         hold a telephonic Case Management Conference on December 13, 2012 at 4:00 p.m. Counsel for  
4         Plaintiff shall contact all opposing counsel appearing in the case on the day and at the time indicated  
5         above and then initiate a *joint* call to the Court at (619) 557-6624.

6         **IT IS FURTHER ORDERED** that a JOINT discovery plan re: PAGA-related discovery  
7         shall be lodged with Magistrate Judge McCurine's chambers at [efile\\_mccurine@casd.uscourts.gov](mailto:efile_mccurine@casd.uscourts.gov).  
8         on or before December 10, 2012.

9         **IT IS SO ORDERED.**

10      DATED: December 4, 2012

  
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Hon. William McCurine, Jr.  
U.S. Magistrate Judge, U.S. District Court

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